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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of TARA E. and JAMES
S. BURNS.

TARA E. ADAMS,

Petitioner,

v.

JAMES S. BURNS,

Respondent;

DAVID T. KAYE,

Objector and Appellant.

D053065

(Super. Ct. No. DN126822)

APPEAL from an order of the Superior Court of San Diego County, Joseph P.

Brannigan, Judge. Reversed.

In this family law matter, Attorney David T. Kaye appeals from an order requiring him and his former client Tara E. Adams (formerly Tara E. Burns) to pay \$20,000 in

attorney fees to James S. Burns as a sanction under Family Code¹ section 271 for engaging in conduct that frustrated the policies of promoting cooperation, settlement of litigation and reduction of litigation costs.

Kaye argues, among other things, that sanctions may not be imposed on a party's attorney under section 271. As we will explain, we agree. Accordingly, we reverse the order imposing sanctions on Kaye.

I

FACTUAL AND PROCEDURAL BACKGROUND

A judgment of dissolution of the marriage of Adams and Burns was entered in 2003. As of mid-2005, Burns was ordered to pay Adams \$1,300 per month in child support for their two children and \$505 per month in spousal support. According to evidence in the record, Burns made timely support payments. Nevertheless, Adams applied to the court to obtain a wage assignment for the payment of child and spousal support in October 2006, apparently without notifying Burns that she had done so. Because he was not aware of the wage assignment, Burns continued to send checks to Adams. Burns finally noticed the wage assignment in March 2007 when he reviewed his paycheck stubs. Adams remarried in early February 2007, but the wage assignment with respect to the spousal support continued for several months. (See § 4337 [termination of spousal support upon remarriage].) Due to this situation, Burns contends that he made overpayments to Adams of more than \$6,000.

¹ All further statutory references are to the Family Code unless otherwise indicated.

Through his attorney, Burns contacted Adams's attorney, Kaye, in March and April 2007 to try to obtain repayment from Adams and to obtain a modification of the wage assignment to delete the amount for spousal support due to Adams's remarriage. Kaye responded by stating that Adams had "gladly accepted payments from [Burns], in addition to the Wage Assignment," and had applied them to what she believed were reimbursable expenses owed by Burns for items such as medical expenses and childcare. Kaye stated, "We . . . agree to immediately return any true overpayments received after [Burns] has involuntarily reimbursed [Adams] for all unpaid expenses that have accumulated," and that he would "provide a detailed accounting of all unpaid expenses." Kaye eventually obtained a stipulated order terminating spousal support, and he ultimately filed a modified wage assignment with the court on June 28, 2007, and forwarded it to Burns's employer.

On June 11, 2007, Burns filed an order to show cause seeking reimbursement from Adams for the overpayments that he had made. A hearing was set for July 17, 2007. Kaye contacted Burns's attorney to ask for a continuance of the hearing and advised that he would be filing a companion order to show cause to obtain reimbursement from Burns for amounts that Adams claimed were owing. Burns's attorney replied that Burns would agree to the continuance on certain conditions and included a stipulation reflecting those conditions. Kaye did not agree to the stipulation; the hearing was not continued; and neither Kaye nor Adams appeared at the hearing. The matter was accordingly continued to August 28, 2007, and the trial court directed among other things (1) that any companion motion by Adams must be filed and served by July 25, 2007; and (2) that

Kaye and Adams must both be present at the August 28, 2007 hearing. On August 24, 2007, Adams filed her own order to show cause to obtain reimbursement of allegedly delinquent support payments and medical and childcare expenses.

At the August 28, 2007 hearing, Kaye appeared, but, according to Adams, he had her wait in another room while he attended the hearing to ask for another continuance.

Burns then filed a companion order to show cause, seeking a sanctions order under section 271 requiring that Adams and Kaye pay his attorney fees. Burns's order to show cause stated that "the wrongful acts of [Kaye] caused or contributed to the need for [Burns's] attorneys fees" and cited the following conduct: "a. the failure to serve timely a copy of the wage assignment[;] b. the failure to take prompt action to vacate or amend said wage assignment once it was known to be in err[or][;] c. the asserting of frivolous and/or unreasonable positions[;] d. the failure to appear at a duly noticed hearing[;] e. the failure to follow a Court order regarding the filing of a companion motion[;] f. requesting a second continuance on the [instant] motion[;] and g. failing to act reasonably in the settlement of the pending issues."

Before her response to the order to show cause regarding the imposition of sanctions was due, Adams substituted a different attorney for Kaye. In her responsive declaration to the order to show cause, Adams stated that she now believed that she had received "a lot of misleading or flat out wrong advice as to how to proceed in the court matters" from Kaye, and that after obtaining new counsel, she found out Kaye had not forwarded to her certain communications from Burns's attorney. She also explained that when she received the first overpayment of support from Burns, Kaye advised her to keep

it and apply it to any unreimbursed medical expenses. According to Adams, Kaye told her that Burns was aware of the wage assignment and that if Burns made additional payments, that was "'his problem.'" Adams also stated that she did not authorize Kaye to send Burns the letter stating that Adams would keep the overpayments as an offset.

At the November 29, 2007 hearing on the orders to show cause, the parties stipulated that Burns made overpayments of support to Adams in the amount of \$8,566.95. At the time of the hearing, Adams had already reimbursed Burns for some of that amount, and the rest was ordered to be paid in installments. The hearing on the remaining issues, including Adams's request for reimbursement of expenses and Burns's request for sanctions under section 271, was continued to February 1, 2008. The trial court specifically directed that Burns was to give notice of the new hearing date to Kaye. A proof of service in the record indicates that Burns gave notice of the new hearing date to Kaye.

Kaye did not appear at the February 1, 2008 hearing.² At the hearing, the parties resolved the remaining reimbursement issues by stipulation. With respect to Burns's request for sanctions under section 271, the trial court ruled that Burns should recover the attorney fees he incurred in seeking reimbursement from Adams. The trial court ruled, "[T]his case was improperly litigated by Mr. Kaye, including the taking of legal positions that were without merit. The Court finds that it is clear from the record of this case that

² During the hearing, counsel for Burns stated that "[Kaye] made a representation to one of my office staff persons that he did not intend to appear; that he did not intend to respond further; [and] that the declarations already in the file spoke for themselves."

the policy of the law to promote settlement was not carried out."³ The trial court accordingly awarded the sum of \$20,000 to Burns, to be paid by Kaye and Adams as a joint and several liability.

The written order imposing sanctions was entered on February 22, 2008, but Kaye became aware of it before that date when he received a copy of the proposed order prepared by counsel for Burns. On February 19, 2008, Kaye filed an ex parte application to set aside the trial court's sanctions order against him. The trial court denied the application, stating that it was "not an emergency." Kaye then filed an order to show cause on February 22, 2008, asking that the court set aside the order imposing sanctions. In a lengthy unsigned declaration submitted along with the order to show cause, Kaye argued that sanctions were not warranted; claimed that he was not served with notice that the sanctions hearing was continued to February 1, 2008; and explained that he no longer actively tracked the case after the substitution of counsel. In a separately filed memorandum of points and authorities, Kaye argued that section 271 does not authorize an order requiring a party's attorney to pay sanctions. The trial court denied Kaye's motion to set aside the sanctions order. On May 16, 2008, Kaye filed a notice of appeal from the order imposing sanctions on him.

³ On our independent review of the record, we find no basis to question the trial court's ruling as to Kaye's conduct or culpability.

II

DISCUSSION

A. *Timeliness of the Appeal*

As a preliminary matter, we address the timeliness of Kaye's appeal. Burns contends that the appeal is not timely. We disagree.

Under California Rules of Court, rule 8.104(a)(3), if a party has not been served with the order from which he is appealing, he has 180 days from the date that the order was entered to file an appeal.⁴ Based on our review of the appellate record provided by the parties and our own review of the superior court file, we see no indication that Kaye was served — either by the trial court or one of the parties — with the February 22, 2008 order imposing sanctions on him. Accordingly, under rule 8.104(a)(3) the deadline for Kaye to appeal was 180 days after the February 22, 2008 order. This appeal was filed on May 16, 2008, which is within 180 days of the entry of the February 22 order. The appeal is timely.⁵

⁴ All further rule references are to the California Rules of Court.

⁵ Although it is clear from the record that by the time he filed his ex parte application on February 19, 2008, Kaye had actual notice of the trial court's ruling imposing sanctions, the deadline to appeal is not calculated based on the date of actual notice but instead by reference to the date of service or the date of entry of a judgment or appealable order. (Rule 8.104(a)(3).)

B. *Sanctions May Not Be Imposed on an Attorney Under Section 271*

Kaye argues that we should reverse the order imposing sanctions on him because section 271 does not authorize a court to order sanctions against party's attorney. As we will explain, we agree.

Section 271 provides in relevant part:

"(a) [T]he court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. . . ."

"(c) An award of attorney's fees and costs as a sanction pursuant to this section is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property."

Based on the statutory language, including the statement that a sanction is "payable only from the property or income of the party against whom the sanction is imposed" (§ 271, subd. (c)), case law holds that section 271 "does not allow or contemplate an award against an attorney." (*In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1110 (*Daniels*)).⁶ Case law establishes that "Family Code section 271

⁶ *Daniels, supra*, 19 Cal.App.4th 1102, was decided under former Civil Code section 4370.6, which was subsequently recodified as Family Code section 271 without substantive change. (See *In re Marriage of Freeman* (2005) 132 Cal.App.4th 1, 6 ["The Family Code adaptation of section 271 continues former Civil Code section 4370.6 without substantive change, except that it was broadened to apply to all proceedings

allows the imposition of sanctions for the conduct of a party or an attorney that frustrates the policy of promoting settlement and cooperation. The sanction can be imposed *only against a party*, however, and is 'payable only from the property or income of the party against whom the sanction is imposed.'" (*Orange County Dept. of Child Support Services v. Superior Court* (2005) 129 Cal.App.4th 798, 804, italics added; see also *Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 403-404, fn. 7 [agreeing that "sanctions under Family Code section 271 may only be imposed on a party, not on the attorneys"].) Treatises concur that an attorney may not be sanctioned under section 271. (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2008) ¶ 14:237, p. 14-62 ["while § 271 imposes duties upon *counsel* as well as counsel's client to cooperate in seeking to resolve the litigation . . . , those duties are enforced under the statute by means of a fees and costs award *against the party, not counsel* — even when the sanctionable conduct lies solely with a party's counsel"]; 2 Cal. Civil Practice: Family Law Litigation (2003) § 10:14, p. 22 ["An award under Fam. Code, § 271, subd. (a) can be imposed only against a party and not an attorney"].)

under the Family Code"].) Burns contends that *Daniels* is not persuasive because its analysis of the scope of former Civil Code section 4370.6 was based, in part, on the observation that another statute existed under which an attorney could be sanctioned, namely Code of Civil Procedure section 128.5. (*Daniels*, at p. 1110.) Burns argues that because Code of Civil Procedure section 128.5 does not apply to cases filed after January 1, 1995 (see *Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 164 (*Clark*)), *Daniels* is no longer persuasive authority. We disagree. *Daniels* cited Code of Civil Procedure section 128.5 to demonstrate that statutes *other* than Family Code section 271 exist under which an attorney may be sanctioned. That observation is still relevant. The only difference is that Code of Civil Procedure section 128.7 is now the operative statute under which an attorney may be sanctioned.

"[A] court's inherent power to exercise supervisory control over judicial proceedings does *not* include the power to award attorney fees as a sanction for attorney misconduct absent specific legislative authorization or agreement of the parties." (*Clark, supra*, 165 Cal.App.4th at p. 163.) Here, because section 271 does not authorize the imposition of sanctions on a party's attorney, and neither Burns nor the trial court identified any other statutory basis for the sanctions order, the trial court lacked authority to impose sanctions on Kaye. We thus reverse the trial court's order imposing sanctions on Kaye.⁷

DISPOSITION

The order imposing sanctions on Kaye under Family Code section 271 is reversed. The parties are to bear their own costs on appeal.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.

⁷ Although Kaye's conduct was the basis for the award of sanctions, the trial court imposed the sanctions jointly against Kaye and Adams, and Adams has not appealed from the sanctions award. Thus, Adams alone remains liable for the \$20,000 in sanctions.